RIGHTS AND LIABILITIES OF STOCKHOLDERS IN DE FACTO CORPORATIONS.—A corporation is an artificial being, invisible, intangible, and existing only in contemplation of law.[1] As it is a mere creature of the law, it possesses those powers only which are given it by its charter, either expressly or impliedly.[2] Beyond the specific purposes for which it was created, and the lines of limitation the law has drawn around it, it is without power to act or capacity to take.[3] It can be created by or under legislative authority, and by that alone.[4]

The idea of separate personality is at the base of the corporation concept.[5] The true test then whether a particular association is a corporation or not is whether or not the association is a complete juristic person separate and distinct from its members.[6] The rights of a corporation are not the joint rights of the sum of its individual members, but the sole rights of the collective whole as embodied in the separate and distinct entity.[7] This collective whole or invisible entity which is called into existence and lives by means of the corporate constitution, and which operates not through the medium of other persons, but immediately, is a new subject of rights and duties.[8]

Since a corporation is an entity, an existence, irrespective of the persons who own all its stock, the stockholders are not subject to the same kind of liabilities that are incident to a partnership.[9] The Supreme Court of the United States sets forth the advantages of a corporation over a partnership as follows: "The continuity of the business, without interruption by death or dissolution, the transfer of property interests by the disposition of shares of stock, the advantages of business controlled and managed by corporate directors, the general absence of individual liability, these and others things inhere in the advantages of business thus conducted, which do not exist when the same business is conducted by private individuals or partnerships." [10] In short the common law liability of a stockholder in a corporation is simply a question of contract between him and the corporation, and in the absence of a statutory or constitutional

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[1] In re Gibbs Estate, 157 Pa. St. 59, 27 Atl. 383, 22 L. R. A. 276; Dartmouth College *v.* Woodward, 4 Wheat. (U. S.) 518.

[2] Valley R. Co. *v.* Lake Erie & Co., 46 Ohio St. 44, 18 N. E. 486, 1 L. R. A. 412; Coyle *v.* McIntire, 7 Houst. (Del.) 44, 30 Atl. 728, 40 Am. St. Rep. 109.

[3] Baltimore Ry. Co. *v.* Fifth Baptist Church, 108 U. S. 317; In re Gibbs Estate, *supra.*

[4] Spottswood *v.* Morris, 12 Idaho 360, 85 Pac. 1094, 6 L. R. A. (N. S.) 665; Feiner *v.* Reiss, 98 App. Div. 40, 90 N. Y. Supp. 568.

[5] State *v.* Tacoma & Co., 61 Wash. 507, 112 Pac. 506; Exchange Bank *v.* Macon Const. Co., 97 Ga. 1, 25 S. E. 326.

[6] Re Goetz's Estate, 236 Pa. St. 630, 85 Atl. 65; THOMP. CORP., 2 ed., § 9.

[7] Bank *v.* Monroe & Gifford, 72 Iowa 750, 32 N. W. 669; Rough *v.* Breitung, 117 Mich. 48, 75 N. W. 147.

[8] Humphreys *v.* McKissock, 140 U. S. 304.

[9] Birch *v.* Cropper, L. R. 14 App. Cas. 525; COOK CORP., 7 ed., § 6.

[10] Flint *v.* Stone Tracy Co., 220 U. S. 107.

provision to the contrary, all liability is terminated by the payment of the full par value of his stock.[11]

Therefore, since a private corporation can only be created by or under a legislative enactment and by this authority alone is the stockholder relieved from the duties and liabilities of a partner, it frequently becomes an important consideration to determine what are the results when on account of some defect, mistake, or irregularity the incorporators have failed to comply fully with the provisions of the general incorporating statutes. This question most often arises in the case of *de facto* corporations. There are three essential requisites necessary to constitute a *de facto* corporation:[12] (1) a charter or general law under which such a corporation as it purports to be might lawfully be organized; (2) an actual and *bona fide* attempt to organize thereunder; and (3) an actual user of the corporate franchise. The theory that a *de facto* corporation has no real existence, that it is a mere phantom, to be invoked only by that rule of estoppel which forbids a party who has dealt with a pretended corporation to deny its corporate existence, has no foundation, either in reason or authority.[13] A *de facto* corporation is a reality; it has an actual and substantial legal existence.[14]

A *de facto* corporation may legally do every act and thing that a *de jure* corporation of the same character can do.[15] As to all the world, except the sovereign power from which it derives its existence, it occupies the same position as though it were *de jure;* and even against the state, except in direct proceedings to annul its charter, its acts will be treated as efficacious.[16] It therefore follows that no private person will be allowed to inquire collaterally into the regularity of its organization.[17] A subscriber for stock in a corporation cannot, when sued for calls on his stock, set up that the corporation was not duly organized.[18] Nor can a stockholder question the legal existence of the corporation on the ground that it was irregularly organized.[19] A corporation creditor seeking to enforce the payment of his debt, cannot ignore the existence of the corpora-

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[11] United States *v.* Stanford, 161 U. S. 412; Gainey *v.* Gilson, 149 Ind. 58, 48 N. E. 633.

[12] Tulcare Irrigation Dist. *v.* Shepard, 185 U. S. 1; Whipple *v.* Tuxworth, 81 Ark. 391, 99 S. W. 86.

[13] Pope *v.* Capital Bank, 20 Kan. 440, 27 Am. Dec. 183; Society Pernu *v.* Cleveland, 43 Ohio St. 481, 3 N. E. 357.

[14] Society Pernu *v.* Cleveland, *supra;* East Norway Lake Church *v.* Froislie, 37 Minn. 447, 35 N. W. 260.

[15] Miller *v.* Newburg & Coal Co., 31 W. Va. 836, 8 S. E. 600, 13 Am. St. Rep. 903; Harris *v.* Gateway Land Co., 128 Ala. 652, 29 So. 611.

[16] San Diego Gas Co. *v.* Frame, 137 Cal. 441, 70 Pac. 295; Holt Co. *v.* Hodgin, 180 Mo. 70, 79 S. W. 148.

[17] Hamilton *v.* Clarion Ry. Co., 144 Pa. St. 34, 23 Atl. 53, 13 L. R. A. 779; Fink *v.* Schneider Granite Co., 187 Mo. 244, 86 S. W. 213, 106 Am. St. Rep. 452.

[18] Buffalo Ry. Co. *v.* Cory, 26 N. Y. 75; Cox *v.* Dickie, 48 Wash. 264, 93 Pac. 523.

[19] Cannon *v.* Brush & Co., 96 Md. 446, 54 Atl. 121.

tion, and proceed against the supposed stockholders as partners, by proving that the prescribed method of becoming incorporated was not exactly followed.[20] Also persons sued by a *de facto* corporation in an action either *ex contractu* or *ex delicto* are debarred from setting up the defense that the corporation was not legally organized.[21] Neither is the corporation itself any more entitled to set up the defense of irregular, incomplete or defective incorporation than are the persons who are suing it.[22]

This doctrine in regard to *de facto* corporations extends only to the cases where but for some irregularity of organization the corporation would have been *de jure*.[23] It is not applicable where there is no law authorizing the existence of any such corporation at all, as the one which assumes to exist; and the same is true where the law under which the corporation claims to exist is unconstitutional; for a void statute is the same as no law at all.[24]

The weight of modern authority seems to be in accord with the general rule as laid down by the supreme court of Michigan and followed in the recent case of *Swofford Bros. Dry Goods Co.* v. *Owen* (Okla.), 133 Pac. 193: "Where there is thus a corporation *de facto*, with no want of legislative power to its due and legal existence; where it is proceeding in the performance of corporate functions and the public are dealing with it on the supposition that it is what it professes to be, and the questions suggested are only whether there has been exact compliance with the provisions of the law relating to incorporation; it is plainly a dictate alike of justice and public policy, that in controversy between the *de facto* corporation and those who have entered into contract relations with it, as corporators or otherwise, that such questions should not be suffered to be raised." [25] This conclusion seems to be both reasonable and just. For there is no reason why parties who have dealt with a corporation as a corporation should afterwards be allowed to claim more than they originally bargained for, and to hold the stockholders personally liable.[26]

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[20] Imperial Bldg. Co. *v.* Chicago, etc., Co., 238 Ill. 100, 87 N. E. 167; Magnolia & Co. *v.* Zimmern's Co., 3 Ala. App. 578, 58 So. 90.

[21] Keokuk Commercial Bank *v.* Pfeiffer, 108 N. Y. 242, 15 N. E. 311; Kelleher *v.* Denver Music Co., 48 Colo. 212, 109 Pac. 860; Saunders *v.* Bank of Mecklenburg, 112 Va. 443, 71 S. E. 714.

[22] Perine *v.* Grand Lodge, 48 Minn. 82, 50 N. W. 1022; Marion Bond Co. *v.* Mexican Co., 160 Ind. 558, 65 N. E. 748.

[23] Snyder *v.* Studebaker, 19 Ind. 462; Eaton *v.* Walker, 76 Mich. 579, 43 N. W. 638.

[24] Heaston *v.* Cincinnati Ry. Co., 16 Ind. 275; Everson *v.* Ellingson, 67 Wis. 634, 31 N. W. 342.

[25] Swartwout *v.* Michigan Ry. Co., 24 Mich. 389; Snider's Son's Co. *v.* Tray, 91 Ala. 224, 8 So. 658, 24 Am. St. Rep. 887, 11 L. R. A. 515; Imperial Bldg. Co. *v.* Chicago, etc., Co., *supra*.

[26] Whitney *v.* Wyman, 101 U. S. 392; Magnolia & Co. *v.* Zimmern's Co., *supra*.